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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-268

IRVING POLCOVER, *Petitioner*

v.

SECRETARY OF THE TREASURY, COMMISSIONER OF INTERNAL REVENUE, CHAIRMAN AND COMMISSIONERS, UNITED STATES CIVIL SERVICE COMMISSION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Irving Polcover of the State of New York hereby respectfully petitions the Supreme Court of the United States to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 4, 1973, and the said Court's denial, on May 11, 1973, of petitioner's petitions for rehearing and reconsideration by the original panel of the Court of Appeals and by the Court of Appeals *en banc*.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. No opinion was rendered by the United States District Court for the District of Columbia, which granted the Government's motion for summary judgment and dismissed petitioner's complaint for reinstatement to the federal position he held for 18 years, without any hearing and without even scheduling oral argument.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Court of Appeals were rendered on April 4, 1973. Petitioner's petitions for rehearing and for reconsideration *en banc* were denied on May 11, 1973. Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by Title 28 U.S.C. § 1254(1), this petition having been filed within ninety days after the Court of Appeals denied petitioner's applications for rehearing and rehearing *en banc* on May 11, 1973, in the manner prescribed by Title 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

This petition presents for review the following questions of vital importance not only to petitioner, a federal employee who was summarily removed from his position with the Internal Revenue Service after 18 years of excellent service to the United States, but to federal employees generally:

> (1) Whether the Fifth and Sixth Amendments require the Government to carry the burden of proof in a federal removal proceeding wherein it is proposed to discharge a federal civil service employee on the basis of a serious criminal charge?

(2) Whether the Fifth and Sixth Amendments require the Government, which simultaneously discharges and indicts a federal civil service employee on the basis of the *same serious criminal charge,* to establish that charge *beyond a reasonable doubt* in *both* the federal criminal proceeding and the federal removal proceeding, particularly in a case where the employee is *unanimously acquitted* of that charge in the federal criminal proceeding and the Government thereafter elects to base the federal discharge exclusively on the transcript of that criminal trial?

(3) Whether the Fifth and Sixth Amendments require the Government in a federal removal proceeding to prove a serious criminal charge (such as alleged bribery) against a federal civil service employee *beyond a reasonable* doubt in light of the fact that arbitration tribunals regularly require that quantum of proof in private industry discharge cases based on even less serious criminal charges?

(4) Whether the Fifth and Sixth Amendments require the Government in a federal removal proceeding to confront a federal civil service employee with the witness who charged that employee with the acceptance of an alleged bribe, especially in a case where the employee, previously acquitted of the bribery charge in a federal court, demands the right to confront and cross-examine that witness?

(5) Whether petitioner's rights under the Veterans' Preference Act (Title 5 U.S.C. 7512(b)(2)) were seriously violated in this case when he was prevented from personally answering the alleged

bribery charge against him to an official of the Internal Revenue Service possessed of authority either to make a final decision on the proposed removal action or to recommend what decision should be made?

(6) Whether courts in the federal system have the absolute power to review federal employee removal actions to determine whether they violate the Constitution, federal statutes and regulations and whether they are supported by the necessary quantum of evidence in specific cases?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fifth and Sixth Amendments to the Constitution of the United States and the Veterans' Preference Act and regulations thereunder. Pursuant to the provisions of Rule 23(d) of this Court's rules, the text of said provisions, as here applicable, is set forth in the Appendix to this petition.

STATEMENT OF THE CASE

This case presents a truly distressing *constitutional* picture. Petitioner, a Veterans' Preference Act federal civil service employee with more than 18 years of honorable service to the United States Government, was summarily discharged in 1964 as an Internal Revenue Agent in New York City and thereafter *indicted* by a federal grand jury on the basis of the *very same criminal charge*—to wit, that he allegedly accepted a bribe from a New York accountant in connection with the audit of a 1959 federal income tax return (J.A. 24-27, 29). Petitioner steadfastly maintained his innocence, and after long delays attributable solely to the Govern-

ment, he was finally tried by a judge and jury in the United States District Court in New York (J.A. 29). At that trial, the Government presented its entire case against petitioner, and the New York accountant named in the bribery charge was examined and cross-examined (J.A. 30-33). The jury thereafter unanimously returned a verdict of acquittal (J.A. 33).

Petitioner, by then separated from his position and means of livelihood for almost three years because the Internal Revenue Service simply refused to process his administrative appeal until the criminal case involving the *same bribery charge* was concluded, immediately applied for reinstatement (J.A. 33, 34). His application was denied (J.A. 34). Rather, the Internal Revenue Service scheduled a "hearing" on his appeal at which (1) petitioner reiterated his plea of innocence, and (2) *the Government elected to rely exclusively on the transcript of the criminal case which led, as aforesaid, to petitioner's acquittal in the District Court* (J.A. 35-37). When petitioner's counsel thereupon insisted that the Government produce the New York accountant for *live cross-examination* before the IRS Hearing Officer —a procedure the Government had followed in other job appeal cases involving the said accountant's bribery charges against *other IRS agents*—the Government refused to produce him, and the Hearing Officer refused to order his production (J.A. 35, 36).

Shortly thereafter, however, that same Hearing Officer capriciously rendered a decision wherein he stated the *sole* "Issue Considered" by him was whether the New York accountant was truthful when he maintained he bribed the petitioner (J.A. 38). Then, *without ever seeing the New York accountant and without hearing any testimony from and cross-examination of the*

said accountant and thus exclusively on the strength of his own reading of the cold transcript of the criminal trial in which petitioner had been unanimously acquitted of the said bribery charge, the IRS Hearing Officer went on to conclude that the New York Accountant should be deemed *truthful* and that accordingly, petitioner's removal from the federal service should be *perpetuated* (J.A. 38). The Civil Service Commission concurred, so petitioner filed the instant action.

In the District Court, the Government procrastinated for months in the filing of its Answer. Finally, the parties cross-moved for summary judgment, and petitioner's counsel requested oral argument. Additional months went by. Suddenly, on October 6, 1971, the District Court entered a very brief order denying petitioner's motion, granting the Government's cross-motion and dismissing the complaint (J.A. 51). The District Court gave no reasons for its action and it produced no findings of fact or conclusions of law to support its order. Petitioner appealed.

The Court of Appeals, obviously bothered by the manner in which the District Court handled this case, became preoccupied in its opinion with the complete inadequacy of current judicial review procedures in federal employee job reinstatement cases, and finally concluded that the entire problem should be considered by the Judicial Review Committee of the Administrative Conference of the United States (*Slip Opinion,* pgs. 2-8). Then, apparently convinced *(erroneously, we believe)* that its own jurisdiction under current review procedures was exceedingly limited and narrow, the Court of Appeals proceeded to rule:

> (1) That although a federal court would almost certainly view the evidence in this case differently

than did the IRS Hearing Officer and the Civil Service Commission, courts are powerless to alter those agency conclusions when same might be construed as supported by *"substantial evidence"* (*Slip Opinion,* pg. 14);

(2) That although the Constitution clearly requires *"proof beyond a reasonable doubt"* to establish the criminal charge of bribery in a *federal judicial proceeding,* that *same criminal charge* need only be supported by *"substantial evidence"* or a *"preponderance of the evidence"* in a *federal removal proceeding* (*Slip Opinion,* pgs. 14, 15);

(3) That accordingly, petitioner's rights under the Fifth and Sixth Amendments were not violated when the Government found him *guilty* in the federal removal proceeding of the *same criminal charge of bribery* of which he had been *totally acquitted* in the prior federal judicial proceeding—the Government's finding of guilt being based solely on the transcript of proceedings which led to petitioner's *unanimous acquittal* in the federal judicial proceeding (*Slip Opinion,* pgs. 14, 15);

(4) That IRS' refusal to produce the New York accountant for live cross-examination in the federal removal proceeding did not violate petitioner's constitutional rights since petitioner had already enjoyed "extensive cross-examination" of the accountant in the federal judicial proceeding which led to petitioner's acquittal (*Slip Opinion,* pgs. 17, 18);

(5) That although petitioner's rights under the Veterans' Preference Act and the implementing regulations were apparently violated during the

initial IRS removal proceedings in 1964, those violations should be ignored because *"Litigation must end somewhere,"* and it would be burdensome to remand this case to the Civil Service Commission with instructions to hold further hearings at this time (*Slip Opinion*, pgs. 19-26).

ARGUMENT

I.

The Court Of Appeals Completely Ignored The Fact That The Government Made No Effort Whatsoever To Carry The Burden Of Proof In The Removal Proceeding Wherein Petitioner Was Charged With A Serious Crime. Indeed, Under The IRS Regulations, Petitioner Was Compelled To Try To Prove His Innocence In Violation Of The Fifth And Sixth Amendments.

Petitioner was summarily removed from his position with the Internal Revenue Service in late 1964 (J.A. 24-28). Petitioner appealed to the Regional Commissioner of Internal Revenue, but the Commissioner refused to process his appeal until the criminal proceedings involving the identical bribery charge against petitioner were concluded (J.A. 28). Fourteen months later, petitioner was finally indicted on that charge, and approximately three years after his original discharge from the federal service, he was brought to trial and ultimately acquitted (J.A. 29-33). Petitioner thereupon applied for reinstatement to his position (J. A. 33, 34), but was advised a "hearing" was necessary (J.A. 34).

At the outset of the "hearing" before an IRS Hearing Officer, petitioner was advised by a reading from the *Treasury Department's Guide for Conduct of Hearings on Employee Appeals* that the sole purpose of the "hearing" was to give the "employee a chance

to present evidence" to support his plea of innocence to the criminal charge underlying his removal from the service (J.A. 34). The Government made no effort to prove the said criminal charge. In fact, it presented no witensses (J.A. 37).

Petitioner thereupon produced the transcript of the criminal trial in which he had been acquitted of the identical bribery charge, but counsel for IRS objected "to the introduction of anything relating to the criminal case on the ground that the criminal proceedings are irrelevant to the matter at hand here" (J.A. 35). In any event, the said transcript was accepted by the Hearing Officer (J.A. 35).

These arbitrary procedures, which soon resulted in federal rulings banning petitioner from the federal service and branding him with a bribery stigma for life, *plainly violated the due process of law provisions of the Fifth Amendment and they deprived petitioner of the Sixth Amendment right to be confronted with the witnesses against him in a federal job removal prosecution based on a serious crimianl charge* (*Morrissey* v. *Brewer,* 92 S.Ct. 2593 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175 (1963); *Kennedy* v. *Sanchez,* D.C.N.D. Ill., E.D., 349 F. Supp. 863 (1972), app. pending).

Clearly, therefore, the burden of proof—the burden of going forward—was upon the Government in a federal employee removal proceeding (*Weinberg* v. *Macy,* 124 U.S. App. D.C. 1, 360 F.2d 816 (1966)), and when the Government, pursuant to its own IRS regulations, flatly refused even to try to carry the burden of proof

and thus shifted the burden to petitioner from the very outset, petitioner's discharge, based on such procedures, was a nullity (*Weinberg* v. *Macy, supra; Pelicone* v. *Hodges,* CCA, D.C. 1963, 320 F.2d 754; *Connelly* v. *Nitze,* CCA D.C. 1968, 401 F.2d 416). In fact, the Administrative Procedure Act states the rule in simple terms as follows, at Title 5 U.S.C. § 556(d);

> ". . . the proponent of a rule or order has the burden of proof."

The Court of Appeals clearly erred from the outset, therefore, when it completely ignored this extremely important threshhold issue in its decision of April 4, 1973 in the case at bar.

The Fifth And Sixth Amendments Require The Government, When It Simultaneously Discharges And Indicts A Federal Civil Service Employee On The Basis Of The Same Serious Criminal Charge, To Establish That Charge Beyond A Reasonable Doubt In Both The Federal Criminal Proceeding And The Federal Removal Proceeding, Particularly Since That Rule Is Already Universally Applied In Private Industry Discharge Cases. In The Instant Case, Application Of That Rule Is Also Especially Compelling Where Petitioner Was Unanimously Acquitted Of The Criminal Charge In The Federal Criminal Proceeding And The Government Thereafter Elected To Base The Federal Discharge Proceeding Exclusively On The Transcript Of That Criminal Trial.

In 1964, petitioner was removed from his federal position on the ground that he allegedly accepted a bribe to influence an audit of a 1959 tax return. Petitioner was thereafter indicted on that same charge; he was brought to trial and acquitted by a federal District Court in New York. The Government, which had held petitioner's appeal from the federal discharge action in abeyance awaiting the outcome of the criminal case, thereupon ruled, *on the basis of the transcript of that*

criminal trial, that petitioner was nevertheless still guilty, in its opinion, of the birbery charge of which he had already been acquitted. Accordingly, the Government, which was totally unable to prove the bribery charge in a court of law and which made no effort to carry the burden of proof in the IRS discharge proceedings, succeeded in its vendetta against petitioner by banning him from the federal service and by saddling him for life with the stigma of bribery.

The Court of Appeals, relying on the Second Circuit's decision in *Finfer* v. *Caplin,* 344 F.2d 38 (1965), cert. denied 382 U.S. 883 (1965, sustained this utterly capricious, outrageous result by holding (*Slip Opinion,* pgs. 14, 15):

> "The difference between proof to a *'preponderance' of the evidence,* the burden assumed by the agency in administrative proceedings of this nature, and proof *'beyond reasoanble doubt,'* the burden assumed *by the government in criminal prosecutions,* is critical."

But, in cases of this kind, where the removal proceeding and the criminal case are *both* based on the same *criminal charge,* it is perfectly clear that the Government is actually concomitantly engaged in two *"criminal prosecutions."* In the court proceeding, the *punishment* sought for the alleged criminal offense is fine or imprisonment. In the removal proceeding, the *punishment* sought for that *same alleged criminal offense* is at least equally severe—to wit, removal from the federal service after 18 years of past employment, deprivation of salary and the ability fairly to earn a livelihood through other employment, and fixation of a lifelong badge of infamy, e.g., the ugly stain of bribery. *Patently, therefore, the Government's burden of proof*

in the latter prosecution for bribery should not be any lighter than its burden in the former—in both cases, due process of law and simple justice demand that the Government establish the bribery charge beyond a reasonable doubt.

In many instances this Court has analogized federal removal proceedings that cast discharged federal employees into outer darkness to proceedings that really *"involve the imposition of criminal sanctions," and thus this Court has often turned to 'deeply rooted' principles of criminal law for guidance in dealing with such cases (See Peters* v. *Hobby,* 349 U.S. 331, 344-345 (1955); *Greene* v. *McElroy,* 360 U.S. 474, 496-497 (1959); *Williams* v. *Zuckert,* 371 U.S. 531, 533-536 (1963, dissenting opinion)). Plainly, this case demonstrates why it thus imperative for this Court to apply such principles in this area of the law and thus reject the Second Circuit's reasoning in *Finfer* v. *Caplin, supra,* by *holding that when a federal removal action is based on a serious criminal charge, due process requires the Government to establish that criminal charge by the same quantum of proof required constitutionally to establish that same charge in a federal criminal action—namely, by proof beyond a reasonable doubt.*

Such action by this Court in federal removal cases is made even more urgent and compelling by the fact that arbitration tribunals in *private industry discharge cases* have already led the way and applied that same rule as a matter of *"inherent basic justice"* for years (See *United States Steel Corp.* v. *United Steelworkers of America,* 29 LA 272, 276-277 (1957); *General Refractories Co.* v. *United Brick & Clay Workers of America,* 24 LA 470, 481 (1955); *Fruehauf Trailer*

Co. v. *International Association of Machinists,* 21 LA 832 (1954)). In *United States Steel, supra,* the rule was stated as follows, at page 277:

> "The most logical approach would seem to be to hold that, with referene to an offence of the *non-criminal type* (such as violation of rules), a preponderance of the credible evidence will suffice, *whereas the commission of an offence of the criminal type should be proved beyond a reasonable doubt,* in view of the different social effects upon, and the sigma attaching to, the employee whose commission of the offense is duly established . . ." (Italics supplied.)

In *General Refractories,* the rule to be applied in cases involving private industry employers and employees was described in these terms, at page 481:

> "Whenever, therefore, the Company suspends an employee on suspicion that he has committed an offense, the Company necessarily suspends him at its own risk. And the degree of risk which the Company assumes is greater if it suspends an employee on suspicion that he has committed a criminal offense, such as stealing, than if his suspension is based on suspicion of commission of a non-criminal offense, such as insubordination, or smoking in a prohibted area. To sustain a suspension on either of these two types of grounds, the Company is required to prove that the employee is guilty of the offense of which he is suspected, *but the degree of proof requisite to establish guilt of a criminal offense is substantially greater than that required to establish guilt of a non-criminal offense.* The degree of proof required for the latter is measured by the standard known as the 'preponderance of the evidence'. . . . *But to sustain a suspension based on suspicion that an employee has committed a criminal offense, the*

> *evidence must prove the employee guilty 'beyond a reasonable doubt,'* that is to say, the evidence must be such that reasonable persons looking at it would be so sure of the fact of the offense that they would have no hesitancy of finding the employee guilty of the act. *The reason for this distinction is that the social effects upon and the stigma attaching to an employee found guilty of a criminal offense are far greater than those attaching to an employee found guilty of a non-criminal offense. . . .*" (Italics supplied.)

Certainly, the rule in federal removal cases, *where the federal employees involved are protected by the Fifth and Sixth Amendments against unfair, arbitrary capricious Government action,* should not be different than the rule historically followed by private industry, where basic constitutional guaranties are not supposed to be so readily available and applicable. Moreover, that rule should surely apply in the case at bar, where the federal employee involved was unanimously acquitted of the crime of bribery, only thereafter to be "convicted" by arbitrary, capricious IRS superiors on the strength of the very same record which led the District Court to his acquittal.

III.

The Fifth And Sixth Amendments Required The Government In The Federal Removal Proceeding Here Involved To Confront Petitioner With The Witnesses Against Him And To Permit Petitioner To Cross-Examine Those Witnesses, Especially When His Counsel Demanded That Right.

As stated above, the Government refused to produce the New York accountant, who allegedly bribed petitioner, as a witness in the federal removal proceeding, and it denied petitioner's counsel the right to cross-

examine that person. The Court of Appeals sustained the Government's recalcitrance, stating that petitioner's counsel had already cross-examined the accountant at the criminal trial which led to petitioner's acquittal of the bribery charge, and hence "no due process violation occurred" when cross-examination was denied in the later, separate removal proceeding before the Internal Revenue Service. Certainly, litigations in the federal system cannot possibly become so treacherous and diabolical that a unanimous judgment of acquittal in a federal criminal case is to be totally ignored in a subsequent agency removal proceeding based on the same criminal charge, while simultaneously steps the federal employee took to defend himself in that criminal action preclude him of the same constitutional rights and defenses in the ageny removal case!

In any event, this Court recently ruled in *Goldberg* v. *Kelly,* 397 U.S. 254, 269, 270, 90 S.Ct. 1011, 1021 (1970):

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Please see also: *Greene* v. *McElroy,* 360 U.S. 474, 496, 497, 79 S.Ct. 1400, 1413 (1959).

Ergo, the Court of Appeals erred grievously when it sustained the Government's complete denial of petitioner's constitutional right to confront and cross-examine the adverse witness in the case at bar.

IV.

Petitioner's Rights Under The Fifth Amendment Were Violated From The Very Outset When He Was Summarily Suspended And Removed From His Position In 1964 Without A Prior Hearing.

In Points I through III, *supra,* we have sought to demonstrate how petitioner's rights under the Fifth and Sixth Amendments were violated in 1967 and 1968 when, *after* his acquittal in the criminal proceeding, the Government nevertheless arbitrarily and capriciously found him guilty in the federal removal proceeding on the basis of the record in the crimianl trial.

In truth and in fact, however, petitioner's rights under the Fifth Amendment were actually violated from the very outset *in 1964* when the Government summarily separated him from his position as an Internal Revenue Agent without a *prior hearing* of any kind (*Kenendy* v. *Sanchez,* U.S.D.C., N.D. Ill., E.D. 1972, 349 F. Supp. 863, appeal pending; *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972)). In *Kennedy* v. *Sanchez,* the three-judge district court in Illinois stated, at page 865:

> "Accordingly, we hold 5 U.S.C. § 7501 and related regulations to be unconstitutional insofar as they authorize the removal or suspension without pay of federal employees in the competitive service without a prior hearing in which the minimal procedural requirements outlined above are observed."

V.

Petitioner's Suspension And Removal From The Federal Service Were Null And Void Under The Veterans' Preference Act.

The Court of Appeals actually found that petitioner's suspension and removal from the federal service were accomplished in violation of the Veterans' Preference Act (Title 5 U.S.C. § 7512 (b)(2)(1970)), but the Court decided not to reinstate petitioner to his position or to remand the case to the Civil Service Commission solely because it felt *"Litigation must end somewhere,"* and it falsely and erroneously suggested that perhaps petitioner had not squarely raised this procedural issue during the earlier administrative proceedings before IRS and the Commission (See *Slip Opinion,* pgs. 19-26). But the Court of Appeals simultaneously admitted on the face of its opinion (at page 24):

> "Throughout the proceedings, from his first letter to the Regional Commissioner to his final appeal to the Commission, appellant has complained of various procedural deficiencies in his removal."

It is settled, of course, that when a federal employee is suspended or removed from the federal service in violation of federal law or the applicable regulations, that action is a complete nullity (*Vitarelli* v. *Seaton,* 359 U.S. 535, 546, 547 (1959); *Service* v. *Dulles,* 354 U.S. 363; *Powell* v. *Zuckert,* D.C. Cir. 1966, 366 F.2d 634; *Connelly* v. *Nitze,* D.C. Cir. 1968, 401 F.2d 416). The applicable rule was stated by Mr. Justice Frankfurter in his concurring opinion in *Vitarelli* v. *Seaton, supra,* as follows, at 359 U.S. 535, 546, 547:

> "An executive agency must be rigorously held to the standards by which it professes its actions

> to be judged . . . Accordingly, if dismissal from employment is based on a defined procedure, . . . *that procedure must be scrupulously observed* . . . He that takes the procedural sword shall perish with that sword."

It is equally well settled under the Veterans' Preference Act (Title 5 U.S.C. § 7512(b)(2)) that a Veterans' Preference federal civil service employee may *not* be suspended or removed from this position without first being afforded the opportunity *personally* to confer with the official who proposes to suspend or remove him, and if he is removed in violation of this right, the suspension or removal thus obtained is *null, void and unlawful* (*Washington* v. *United States,* Ct. Cl. 1957, 147 F. Supp. 284, 137 Ct.Cl. 344, cert. dismissed 355 U.S. 801; *Patterson* v. *United States,* Ct.Cl. 1963, 319 F.2d 882; *Turney* v. *United States,* 168 Ct. Cl. 77; *Mallow* v. *United States,* Ct. Cl. 1963, 161 Ct. Cl. 207; *Wittner* v. *United States,* 76 F. Supp. 110, 110 Ct.Cl. 231). In *Washington, supra,* the Court of Claims stated, at page 288:

> "The procedural rights of a veteran under Section 14 are clear and simple. In the present case, one of those rights was denied. The plaintiff was denied his right to answer the charges against him in person at the agency level. The fact that he was subsequently given a de novo hearing at a higher level does not cure the procedural defect. Since the *agency did not follow the procedure laid down by Congress, plaintiff's discharge was unlawful.*"
>
> (Italics added.)

In the case at bar, the Court of Appeals found that petitioner had been denied the right to confer *personally* with the District Director who proposed to sus-

pend and remove him, but was instead "relegated to an Oral Reply Officer"—an intermediary who conceded on the record that he was without authority to decide whether or not the proposed suspension or removal should proceed or be terminated. In this regard, the applicable Civil Service regulations state (5 C.F.R. § 752.202(b)):

> "When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. *The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.*" (Italics added.)

Indeed, the Court of Claims has specifically ruled in *Ricucci* v. *United States,* 425 F.2d 1252 (Ct.Cl. 1970), *motion for reconsideration denied,* 432 F.2d 453 (Ct.Cl. 1970), a case involving the proposed removal of an employee by the Internal Revenue Service, that when a Veterans' Preference IRS employee is relegated to an oral reply officer under the Veterans' Preference Act, the procedure is unlawful *unless IRS is able to prove that the oral reply officer actually possessed the power to make a final decision on the proposed adverse action or that he had both the power to make, and actually did make, a recommendation regarding what the final decision should be.* Please see also *Patterson* v. *United States, supra.*

It is truly unbelievable, therefore, that the Court of Appeals in the case at bar would suddenly engage in pure semantics and illogical, hyper-technical reasoning to deprive the very unfortunate petitioner in

this case of his basic rights under the Veterans' Preference Act. In fact, the Court of Appeals' opinion actually runs absolutely contrary to this Court's decisions in *Vitarelli* v. *Seaton* and *Service* v. *Dulles, supra,* in that it seeks to shift the burden of proof on the issue of the Government's *"procedural propriety"* in the removal proceeding from the Government, which "took the procedural sword" in the first place, to petitioner. Plainly, it is the Government's obligation to operate properly under the Veterans' Preference Act, and it is the Government's duty to be able to support its procedures under that statute when they are challenged in federal litigations. How could petitioner possibly be expected to know what an IRS Oral Reply Officer actually did with petitioner's oral reply to a proposed removal action when petitioner had already been summarily banned from the office? In fact, what relevance does that question have in light of the concession on the record in this case that the Oral Reply Officer is not empowered to either make a decision or a decisive recommendation on proposed suspensions or removals, and in light of the Court of Claims' ruling in *Ricucci?*

Clearly, it is vitally important not only to Petitioner but to employees throughout the federal service, for this Court to settle this crucial issue under the Veterans' Preference Act by reversing the Court of Appeals' erroneous ruling in this case and by reinstating and reinforcing the earlier, correct rulings of the Court of Claims in *Washington, Patterson,* and *Ricucci, supra.*

VI.

Courts In The Federal System Possess The Power To Set Aside Federal Employee Suspensions And Removals Accomplished In Violation Of The Constitution Or Applicable Laws And Regulations And To Decide Whether Same Are Supported By The Appropriate Quantum Of Evidence In Specific Cases.

Obviously, the Court of Appeals was surprised at and disturbed by the unfortunate delays and unexplained summary actions taken by the District Court in this case. It is thus understandable that the Court should take the opportunity thus presented to criticize the present state of the judicial review processes in federal employee removal actions. However, it is equally apparent that the Court of Appeals went entirely too far in its conclusions regarding the jurisdiction and power held by federal courts in this area of the law.

For a long time, this Court and others in the federal system have ruled that, in federal employee removal cases, federal courts possess both the jurisdiction and power to set aside any removal accomplished in violation of the Constitution, the statutes, or the applicable regulations and those which are not supported by the appropriate quantum of evidence (*Vitarelli* v. *Seaton, supra; Service* v. *Dulles, supra; Connelly* v. *Nitze, supra; Pelicone* v. *Hodges, supra; Powell* v. *Zuckert, supra; Meehan* v. *Macy,* D.C. Cir. 1968, 392 F.2d 822; *Massman* v. *Secretary of Housing & Urban Development,* D.C.D.C. 1971, 332 F. Supp. 894).

Thus, the Court of Appeals was wrong in its conclusion that federal courts have such limited and narrow jurisdiction and powers in cases of this kind that a remedy cannot be provided even when it is clear that a remedy is necessary to prevent a miscarriage of justice.

Certainly, the Court of Appeals had the power in this case to determine whether petitioner's rights under the Fifth and Sixth Amendments or under the Veterans' Preference Act and regulations had been violated. And, patently the Court of Appeals had the power to decide what different measures of proof should be required in (1) a federal removal case based on a serious criminal charge, and (2) a federal removal action based on other non-criminal charges. Finally, there is no rule of law or other jurisdictional restriction which prevents the granting of relief when the Court actually concludes that a federal employee was removed from his position in violation of the Veterans' Preference law—an Act of the Congress.

It thus seems crucially important for this Court to grant certiorari in this case, not only for the reasons expressed in Points I-V of this petition, but also for the purpose of clarifying the correct jurisdictional rights and powers possessed by federal courts in federal removal actions. This clarification should include a new, authoritative statement of the different measures of evidence required to sustain federal removal actions based on criminal and non-criminal charges, and directions regarding the Government's burden of proof in removal cases of a criminal nature.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted:

EDWARD L. MERRIGAN
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Attorneys for Petitioner

August 9, 1973

APPENDIX A

Constitutional And Statutory Provisions Involved In This Case

Fifth Amendment To The Constitution

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment To The Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Veterans' Preference Act

(Title 5 U.S.C. 7512)

"(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

"(b) A preference eligible employee against whom adverse action is proposed is entitled to—

"(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty

of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

"(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528."

APPENDIX B

Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Dated April 4, 1973

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1920

IRVING POLCOVER, APPELLANT

v.

SECRETARY OF THE TREASURY, ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided April 4, 1973

Edward L. Merrigan for appellant.

Paul L. Friedman, Assistant United States Attorney, with whom *Harold H. Titus, Jr.,* United States Attorney,

John A. Terry, and James F. Rutherford, Assistant United States Attorneys were on the brief, for appellee. *Thomas A. Flannery,* United States Attorney at the time the record was filed also entered an appearance for appellee.

Before BAZELON, *Chief Judge,* TAMM, *Circuit Judge,* and HARRISON WINTER,* *Circuit Judge for the Fourth Circuit.*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Appellant brought suit in the district court against the Secretary of the Treasury, et al., seeking a declaration of the illegality of his removal from federal employment, an injunction restoring him to his position, and a judgment for back pay due and owing him as computed under the Back Pay Act of 1966.[1] On cross-motions for summary judgment the district court, without oral argument and without a statement of reasons, held for the appellee. Recognizing our limited scope of review, and giving due consideration to all the arguments advanced by the appellant in seeking reversal, we affirm the judgment of the district court.

I.

Prior to a discusison of the facts and law in this case we desire to take note of the duplicative nature of judicial review achieved in employee adverse action litigation. This court pointed out some eight years ago in *Dabney v. Freeman,* 358 F.2d 533 (D.C. Cir. 1965), that employee discharge cases, although cast in the mold of original actions in the district court for reinstatement and related relief, are disposed of on the basis of the administrative record and should be governed by the principles generally applicable to judicial review of administrative action. *See Scott v. Macy,* 402 F.2d 644, 647 n.6 (D.C. Cir. 1968). As such, this court has continually held them subject to specific scope

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* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

[1] Pub.L. 89-380, 80 Stat. 94, March 30, 1966.

of review limitations. Comparable with judicial review of the actions of other agencies, the base of this specific scope of review—that of review of final employee adverse action taken by the Civil Service Commission [hereinafter "Commission"]—has broadened over the past twenty years, from review limited to insuring statutory compliance, *see, e.g., Boylan v. Quarles,* 235 F.2d 834 (D.C. Cir. 1956), to that requiring at least the exercise of discretion by the agency official, *see Hargett v. Summerfield,* 243 F.2d 29 (D.C. Cir. 1957), *cert. denied,* 353 U.S. 970 (1957), to finally the more current "rational basis test," *see Eustace v. Day,* 314 F.2d 247 (D.C. Cir. 1962). Regardless of whether the test of today is framed in the language of determining whether the Commission acted in an arbitrary or capricious manner, or whether substantial evidence in the record supports its determination, *see Dabney, supra,* 358 F.2d at 535, 537, the fact demains that the district court is engaged in limited judicial review, and that its determination is based upon the agency record submitted to it. No de novo evidentiary hearing is permitted.[2] *See Dabney, supra,* 358 F.2d at 535.

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[2] In one special instance in the past cases have been remanded to the district court with instructions to hold evidentiary hearings. In Williams v. Zuchert, 372 U.S. 765 (1963), the Supreme Court directed a remand to the district court "with instructions to hold a hearing and determine whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations . . . or . . . whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses for cross-examination." *Id.* at 765. This procedure was followed in Studemeyer v. Macy, 320 F.2d 797 (D.C. Cir. 1963). The procedure in all other instances has been to remand to the Commission to conduct a new hearing as to a specific factual issue, *see* Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966), Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965), to conduct a hearing that was incorrectly denied, *see* Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968), Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971), or upon failure of the record as it stands to remit without prejudice to the agency to institute new procedures, *see* Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968), 349 F.2d 182 (D.C. Cir.

Almost without exception the district court is presented with cross-motions for summary judgment[3] and its decision is often rendered, as it was here, without a written statement of reasons.[4] When subsequently appealed the court of appeals, limiting itself to the precise scope of review utilized by the district court, renders its decision. No specific deference is paid to the decision of the district court[5] (such would be most difficult in any event in the instance of no district court opinion); rather this court reviews the record and determines anew if there has been procedural

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1965). The Court of Claims likewise will not conduct evidentiary hearings when it discovers an issue of fact, but will remand to the appropriate agency level. *See* Camero v. United States, 345 F.2d 798 (Ct.Cl. 1965).

[3] *See, e.g.*, Moore v. Administrator, No. 71-1508 (D.C. Cir. February 14, 1973); Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971); Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968); 349 F.2d 182 (D.C. Cir. 1965); Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968); Mendelson v. Macy, 356 F.2d 796 (D.C. Cir. 1966); Sudduth v. Macy, 341 F.2d 413 (D.C. Cir. 1964).

[4] *See, e.g.*, Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968).

[5] All the court of appeals decisions manifest a fresh look at the record and an independent judgment based thereon. *See, e.g.*, Moore v. Administrator, No. 71-1508 (D.C. Cir. February 14, 1973); Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968); Pelicone v. Hodges, 320 F.2d 754 (D.C. Cir. 1963); Eustace v. Day, 314 F.2d 247 (D.C. Cir. 1962). Only on rare occasions is the opinion of the district court mentioned, and even rarer is there a reference to whether the scope of review it utilized was correct. Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965), is an exception, but it involved a direct attack by the appellant asserting a right to an evidentiary hearing at the district court level.

error,[6] if there is substantial evidence to support the action,[7] or if the Commission action is in some manner otherwise arbitrary or capricious.[8] In other words, we conduct the identical review we are so often called upon to use in statutorily provided judicial review of other agency orders, *e.g.*, F.C.C., N.L.R.B., F.T.C. The only difference is that in this instance our review follows identical review in the district court.

Duplication, delay, expense and despair for the employee-litigant are inherent in such a system. The interposition of the district court serves, it seems to us, no viable purpose. In the case *sub judice* the petition in the district court was filed by appellant on July 18, 1969, and the order granting appellee's summary judgment motion was entered on October 6, 1971—a span of nearly twenty-seven months. We wish not to allocate blame for the delay to either of the parties but to the system which fosters it. Such delay would be undestandable if meaningful results were produced. Here we find none. The record before us is identical to that before the lower court, and even if a district court opinion were filed this court would not be required to afford it any special notice.

Perhaps one way to avoid the duplication would be to accord some deference to the district court's review of the record and its determinations. A parallel to such action could be drawn to the Supreme Court's occasional usage

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[6] *See, e.g., Adams* v. *Laird*, 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968).

[7] *See, e.g.*, Moore v. Administrator, No. 71-1508, (D.C. Cir. February 14, 1973); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965).

[8] *See, e.g.*, Mendelson v. Macy, 356 F.2d 796 (D.C. Cir. 1966); Pelicone v. Hodges, 320 F.2d 754 (D.C. Cir. 1963); Eustace v. Day, 314 F.2d 247 (D.C. Cir. 1962).

of a "hands off" policy regarding courts of appeals decisions in statutory agency review cases. *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951). We find, however, that for several reasons such a maneuver would not be appropriate. (1) The Supreme Court "rule" has developed most strongly in NLRB cases, where the Court has been influenced by the fact that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." *NLRB v. Pittsburgh Steamship Co., supra*, 340 U.S. at 502. No similar Congressional charge exists here. (2) The Supreme Court itself has experienced difficulty in the execution of such a rule."[9] *See Gastelum-Quinones v. Kennedy*, 347 U.S. 469 (1963). (3) A "rule" limiting our appellate review to a determination of whether the district court utilized the proper scope of review, or was clearly erroneous (bypassing questions of the difficulty of application) will most likely in application amount either to a rubber stamp—in which instance we will merely be shifting the needless delay from the district court to the court of appeals—or degenerate into the test we presently utilize. (4) Such review would be contrary to unwaivering precedent established in this circuit, and would treat review of Civil Service Commission action differently from that afforded other agencies. A better solution must be found.

Our displeasure with the review procedure currently utilized is not of recent vintage, nor is it original with this panel. Circuit Judge McGowan has on at least four previous occasions made footnote references to the problem. *See Adams v. Laird*, 420 F.2d 230, 234 n.2 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *Goldwater v. Brown*, 417 F.2d 1169, 1171 n.1 (D.C. Cir. 1969), *cert. denied*, 397

[9] *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.04 (1958).

U.S. 922 (1970); *Scott v. Macy*, 402 F.2d 644, 647, n.6 (D.C. Cir. 1968); *Connelly v. Nitze*, 401 F.2d 416, 417 n.1 (D.C. Cir. 1968).

There is no question that at the minimum a considered, knowledgeable study of the problem is necessary. Quite possibly reasons not now apparent will surface to demonstrate the value of the present procedure. We express no conviction to abandon the present procedure unless close study warrants such a move, and in the last analysis that move must be made by the legislative rather than judicial branch of government. Judge McGowan's suggestion in *Adams v. Laird, supra,* that the topic would be most appropriate for study in the first instance by the Judicial Review Committee of the Administrative Conference of the United States is reaffirmed by this panel. We note that the Conference, acting upon a recommendation of its Committee on Agency Organization and Personnel, has recently adopted *Recommendation 72-8: Adverse Actions Against Federal Employees.* The *Recommendation* calls for expansive changes at the agency level in employee adverse action procedures, changes meant both to provide additional protections to federal employees and to accelerate and simplify the entire process.[10] The *Recommendation* stops short, however, of requesting a revision of the judicial review procedure at agency level, further study of the problem at the judicial review level would seem warranted.

The chapeau of a legislator is not one that we, as members of the judiciary, can or should have stashed away in our wardrobe. We may, however, express concern over matters directly affecting the prompt and efficient dispen-

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[10] The Recommendation is based on a report authored by Professor Richard A. Merrill, University of Virginia School of Law. It provides, *inter alia,* for an evidentiary hearing prior to the effective date of the adverse action, and for single appeal therefrom to a central appellate authority within the Civil Service Commission.

sation of justice. Finding that Judge McGowan's marginal references of the past past have been less than marginally successful in generating study,[11] we have elevated them to the text.

II.

On November 30, 1964, appellant, a Grade GS-12 Internal Revenue Agent with eighteen years experience in the federal service and a Veterans Preference Act beneficiary, received a Notice of Proposed Adverse Action from his District Director. The Notice stated, in pertinent part:

> It is proposed to both suspend you for not more than thirty days and remove you from the Service in order to promote the efficiency of the Revenue Service for the following reasons:
>
> *Charge I: Acceptance of a Bribe*
>
> *Specification*: On or about May 19, 1961, you accepted the sum of $1,000.00 from Mr. Albert M. Goldstein, an accountant of 4 E. 43rd Street, New York, New York, to influence your decision and action in your audit of the 1959 income tax return of his client, R. Carl and Sarah M. Chandler.
>
> *Charge II: Failure to Report the Offer of a Bribe*
>
> *Specification*: You failed to report the offer of the bribe set forth in the specification to Charge I above.

The Notice further advised appellant that he had until 5:00 p.m., December 2, 1964, to reply in writing to the pro-

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[11] *But see* J. Trezise, Judicial Review of Civil Service Determinations Involving Discipline or Removal of Federal Employees, October, 1971, a "tentative working paper of the Administrative Conference of the United States' which advocates statutory review in the court of appeals. The paper notes Judge McGowan's references in the *Connelly* and *Scott* cases, but apparently has not been the subject of any formal action by the Conference. *See also* Johnson and Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178 (1972).

posed suspension, and ten days to reply personally and in writing to the proposed removal (which was to take effect in not less than thirty days).[12] On 4 December appellant, not having replied to the proposed suspension, was notified by letter from the District Director that he was officially suspended without pay. On 8 December appellant's counsel addressed a letter to the Regional Commissioner protesting the suspension and demanding that a hearing "be held to review the actions taken against [appellant] or those contemplated to be taken in the future." Thereafter on 21 December at the direction of the District Director appellant appeared personally before an "oral reply officer." The entire transcript of that proceeding appears in the margin.[13]

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[12] The Notice of Proposed Adverse Action did not inform the appellant of the existence of any underlying statements, documents, investigative reports, etc., upon which the Notice was based and which supported the specifications contained therein. This requirement, now found in 5 C.F.R. § 752.202(2)a(2), did not become a part of the regulations until November 1, 1970. *See* 35 Fed. Reg. 14,917 (September 24, 1970).

[13] The transcript of the Oral Reply Hearing is reprinted in toto:

> MR. ISAACS: The purpose of this meeting today is to give Mr. Irving Polcover an opportunity to make an oral reply to the letter of proposed removal or other disciplinary action which was issued to him November 30, 1964.
>
> I have been appointed by the District Director to hear his oral reply and to accept any additional information or evidence that may be submitted. Up to this point, there has been no decision made to remove Mr. Polcover.
>
> After he has had this opportunity to submit his oral reply, the record will be very carefully studied and all the material, including his written reply, if any, will be carefuly considered.
>
> The District Director will then render a decision in the case. A verbatim transcript will be made of these proceedings and a copy will be furnished to Mr. Polcover. The proceedings will be informal and rules of evidence will not apply.
>
> These proceedings will be conducted in an orderly fashion. We request that all persons speak clearly and slowly enough so that the tape recorder will be able to record all conversation. I would like to emphasize that this is not an appeal

On 22 December the District Director reaffirmed his suspension order "[a]fter careful consideration of your [appellant's] statements and those mode by your attorney on your behalf." An unsuccessful appeal from the suspension order was taken to the Regional Commissioner.

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hearing, but an opportunity to Mr. Polcover to present oral statements and whatever other material he may desire to submit, in addition to his written reply, if any, to the letter of proposed removal.

Before we proceed, I would like each individual to identify himself, for the record.

MR. WEINSTEIN: My name is Jerome S. Weinstein. I am the attorney for Mr. Polcover, with offices at 291 Broadway, Borough of Manhattan, City of New York, and to my right is Mr. Polcover.

MR. POLCOVER: I'm Irving Polcover, what you might call the appellant, or whatever you want to call me.

MR. DENU: I am William Denu, I am the Personnel Technician.

MR. ISAACS: Will you proceed, Mr. Weinstein.

MR. WEINSTEIN: I would like to protest the proposed severance of Mr. Polcover from the service, and object to it on the ground that it is illegal, contrary to the facts, contrary to the law, and that all the proceedings heretofore have been without process of law and in disregard of the rights of my client.

Mr. Polcover is entirely, completely innocent of the charges leveled against him, and I believe that the proposed action, as indicated in the letter of November 30th, should be voided.

In conclusion, I would like again to say that the proposed removal of Mr. Polcover from the service is without basis of fact or in law.

MR. ISAACS: Do you have any further statements or any additional evidence you wish to give at this time, Mr. Weinstein?

MR. WEINSTEIN: We have no evidence other than what Mr. Polcover has stated, that he is innocent, that these charges are without foundation or proof.

MR. ISAACS: If there is no further evidence, I would like to make this statement. Mr. Polcover's reply, submitted here today, will be carefully considered and a decision will be rendered by the District Director.

MR. WEINSTEIN: Thank you.

On 30 December the District Director officially removed appellant from the Internal Revenue Service effective January 5, 1965, and informed appellant of his appeal rights to both the Regional Commissioner and the Civil Service Commission. On January 13, 1965, the appellant by letter of counsel appealed to the Regional Commissioner, stating that "[t]he procedural steps, notices, rulings and perfunctory reviews have been taken by the Service in . . . violation of the rights of my client as an employee and as a citizen of the United States." The letter further challenged the "farcial" [sic] nature of the hearings, the substantiallty of proof, the "so-called specifications" in the Notice, and ended with a demand for a full and complete hearing. On January 19, 1965, appellant received acknowledgement of his appeal, but the hearing was unexpectedly delayed.

On February 5, 1965, the appellant received another letter from the Regional Commissioner. In pertinent part the letter stated:

> At the request of the Director, Manhattan District, and the United States Attorney for the Southern District of New York, we are holding administrative action on Mr. Polcover's appeal in abeyance until the completion of the court action currently pending in that Judicial District in which he will be the defendant.[14]

The letter further informed appellant that within ten days after a verdict was reached in the court action he would

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[14] Although a criminal complaint was filed against appellant on November 23, 1964, and he was subsequently arrested, a criminal indictment was not returned by the grand jury until April 7, 1966. The first count of the indictment charged appellant with violation of 26 U.S.C. § 7214(a)(2) (1970) (knowingly receiving a fee not authorized by law for the performance of his duty to audit the Chandlers' tax return); the second count charged violtaion of 18 U.S.C. § 1001 (1970) (making a false or fraudulent statement in the Internal Revenue field audit examination of the Chandlers' tax return).

have to renew his request for an administrative appeal. In April of 1966 a grand jury returned a two-count bribery indictment against the appellant, and in September of 1967, following a directed verdict of acquittal as to one count, appellant received a jury verdict of acquittal as to the other. On September 29, 1967, appellant renewed his appeal. A hearing followed some three months thereafter. The primary eidence against appellant presented at the hearing was the transcript of testimony given by Mr. Goldstein at the previous trial. On February 23, 1968, the Hearing Officer issued a "Report of Findings" which found levied against appellant. The Regional Commissioner adopted the report, and appellant subsequently took unavailing appeals to the Civil Service Commission's Regional Office and its Board of Appeals and Review. Such appeals constituted the final agency action in appellant's case.[15]

On July 18, 1969, appellant filed a civil action in the district court against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Chairman and Commissioners of the United States Civil Service Commission. He sought a declaratory judgment that his removal from the Internal Revenue Service has been illegal, a judgment for back pay, and an injunction restoring him to his position. He raised, with two notable exceptions discussed below, those issues raised here on appeal. Following cross-motions for summary judgment the district court granted appellees' motion and dismissed the action on October 15, 1971.

III.

Appellant's challenge is not focused solely on the substantiality of the evidence supporting the Commission's

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[15] 5 C.F.R. § 772.307(c): "The decision of the Board is final and there is no further right of appeal." The Commissioners may, in certain enumerated situations, reopen and reconsider any previous decisions. 5 C.F.R. § 772.408. *See* Massman v. Secretary of Housing & Urban Development, 332 F.Supp. 894 (D.D.C. 1971).

determination of removal, but includes allegations of a multitude of procedural errors which he asserts violated his rights under either the Veteran's Preference Act [16] or the United States Constitution. We have considered all (although all are not specifically discussed), and reject all.

We decline to enter into a lengthy discussion of the facts and underlying evidence supportive of the Commission's action. We recognize the limits imposed on our scope of review (*see* part I *supra*) which bind us to the agency record and preclude a de novo consideration of the evidence. The test is not how we would decide the issue based on the evidence in the record, but whether substantial evidence in the record supports the decision of the Commissioner. *See, e.g., Moore* v. *Administrator*, No. 71-1508 (D.C. Cir. February 14, 1973).

The evidence before the Commission's Board of Appeals and Review consisted primarily of that presented to the hearing office on January 9, 1968, pursuant to the appeal taken to the Regional Commissioner. Included therein is the transcript of the criminal trial testimony of Mr. Goldstein (reasserting that a bribe was given), and Mr. Chandler, disclaiming knowledge of a bribe), a sworn affidavit of Goldstein to the effect that he had given a $1,000 bribe to appellant in exchange for a favorable audit of Chandler's 1959 income tax return, and various work papers of Goldstein and Chandler tending to support the bribe allegation. Undoubtedly the hearing officer and the various appellate levels after him gave significant weight to the sworn affidavit and testimony of Goldstein. Appellant's evidence consisted chiefly of a complete denial of involvement, his out work papers (which supported the taxpayer's claimed liability, but which were not submitted to the IRS until the day of the alleged bribe), and an attack (which was of some merit) upon Goldstein's credibility. Although we

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[16] 5 U.S.C. §§ 7511, 7512, 7701 (1970).

might otherwise view the evidence were we in the legal position of the hearing officer or the Commission, we have little difficulty finding that substantial evidence supports their conclusion that the preponderance of the evidence sustains the specifications and consequent removal. As such, that conclusion must not be altered.

Appellant makes much of the fact that he was acquitted of the parallel criminal charges filed against him, and that the acquittal was in the fact of evidence identical to that before the Commission. The difference between proof to a "preponderance" of the evidence, the burden assumed by the agency in administrative proceedings of this nature, and proof "beyond a reasonable doubt," the burden assumed by the government in criminal prosecutions, is critical. As the second circuit court of appeals stated in *Finfer* v. *Caplin,* 344 F.2d 38, 41 (2d Cir. 1965), *cert. denied,* 382 U.S. 883 (1965):

> The law does not require that the proof which might lead to an administrative determination that removal would be for the best interests of the IRS be of the same quality as would be necessary to convince a jury beyond a reasonable doubt to convict in a criminal case. The jury, to be sure, had not been convinced beyond a reasonable doubt but the Commission could well have concluded that the evidence was substantial enough to justify a refusal to reinstate.

See also *Silver* v. *McCamey,* 221 F.2d 873, 875 (D.C. Cir. 1955).

IV.

Three procedural defects that can be dealt with in summary fashions are alleged.

1. Thirty-seven month delay

Appellant complains of the thirty-seven month delay between the February, 1965, letter of the Regional Com-

missioner informing him that his appeal would be held in abeyance until "the completion of the court action currently pending," and the March, 1968, final decision of the Regional Commissioner following a full hearing. Alleging three distinct bases for his complaint appellant conceives such action to be arbitrary, unreasonable, and capricious.

(1) Appellant asserts that there was no criminal action pending against him at the time of the notification. While it is true that the indictment did not issue until some fifteen months later, we agree with the appellee that there indeed was a criminal action "pending" from November 23, 1964, when a criminal complaint against appellant was filed by an IRS agent, until the trial in September of 1967.

(2) Appellant complains of needless "stigma" that attached for an unreasonable length of time as a result of his inability to clear his name in the administrative proceedings. The stigma of bribery attached primarily because of the pendency and conduct of the criminal proceedings, was not because of the removal. Once the criminal action was terminated the full hearing and decision were rendered within a reasonable time.

(3) Appellant complains that the delay violated the Veterans Preference Act and applicable regulations. Although 5 C.F.R. § 771.214 [17] does call for "expeditious consideration" and the avoidance of "unreasonable delay" in the handling of agency appeals, the parameters of reasonable delay must be developed in a practical vein. Nowhere in the regulations is there a proscription of a delay occasioned by circumstances such as these. This court has specifically warned of the dangers of subjecting an em-

[17] There have been slight changes in the wording and numbering of the Commission regulations over the past eight years. Unless the changes affect substantial rights our citations will be to the current compilation.

ployee to an administrative hearing while criminal action is pending. *Silver* v. *McCamey, supra,* 221 F.2d at 874-75:

> We agree . . . that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial. (Footnote omitted.)

See also Finfer v. *Caplin, supra,* 344 F.2d at 40, and *Grossner* v. *Trustees of Columbia University in City of New York,* 287 F.Supp. 535, 551 (S.D.N.Y. 1968). In *Cohen* v. *United States,* 369 F.2d 976, 988 (Ct. Cl. 1966), *cert, denied,* 387 U.S. 917 (1967), the Court of Claims was confronted with the identical problem. The test utilized in *Cohen,* and the one we feel should control, was whether any "demonstrable prejudice" could be shown to have been caused by the delay. We find none here, and additionally note an interesting factor we find important, although not controlling. The record shows nothing regarding a request by appellant—following receipt of the Regional Commissioner's "abeyance" letter—that the appeal hearing be held notwithstanding the pendency of the criminal proceedings. There simply has not been a showing that the agency was arbitrary or capricious in the imposition of the delay.

2. Right of cross-examination

Appellant complains that his fifth and sixth amendment rights, along with those preserved for him by the applicable regulations, were violated when the government failed to produce Goldstein, appellant's accuser, at the evidentiary hearing. The record shows that appellant's request for live confrontation was not made until the completion of the hearing, and that although Goldstein had been used by the agency in other hearings, he was not within its

employ. Neither the Internal Revenue Service nor the Commission has power to subpoena witnesses, and while 5 C.F.R. § 771.210(f) provides that "[t]he examiner shall give the parties opportunity to cross-examine witnesses who appear and testify," and 5 C.F.R. § 771.211(b) requires an agency normally to render its employees available as witnesses when so requested, no constitutional or regulatory violation existed here. *Williams* v. *Zuckert,* 372 U.S. 765 (1963), is controlling in establishing that (a) the burden is on the petitioner desiring the presence of witnesses at his hearing to make a timely and sufficient attempt to obtain their presence, or to show that under the circumstances and without fault of his own he was justified in failing to make such an attempt; and, if so (b) to show that *proper* and *timely* demand was made upon the agency to produce such witnesses for cross-examination. Appellant's demand, coming at the end of the hearing, was neither proper nor timely. *See Garcia* v. *Schwartz,* 283 F. Supp. 157 (D. Colo. 1968), and the cases cited therein. *Cf. Goldwasser* v. *Brown, supra,* 417 F.2d at 1174. Appellant's extensive cross-examination of Goldstein at the criminal trial solidifies our opinion that no due process violations occurred at the hearing.

3. Suspension without opportunity to personally answer

Specifically for the first time on this appeal appellant alleges that the failure to afford him an opportunity to personally reply to the proposed *suspension* violated his procedural rights and voided the entire removal process. Only a cursory study of the regulatory scheme adopted to implement the Veterans Preference Act is needed to prove the error of this allegation. Title 5, U.S.C. § 7512(b)(1970) provides, *inter alia,* that "[a] preference eligible employee against whom adverse action is proposed is entitled to . . . (2) a reasonable time for answering the notice personally and in writing . . . ." Adverse action is defined in 5 U.S.C. § 7511(2) (1970) to include "removal, *suspension for more*

than 30 days, furlough without pay, or reduction in rank or pay." (Emphasis added.) The suspension of appellant was by its terms for "not more than thirty days," and thus not within the "adverse action" definition. Title 5, C.F.R. § 752.202(d) and (e) discusses the duty status of employees during the notice (thirty day) period prior to removal. Section 752.202(e) provides that when retention of an employee in an active duty status may be detrimental to the Government or the general public (circumstances we find present when the specifications involve actions of th nature involved in this case) "the agency may suspend him." If the suspension is for thirty days or less, the procedures required in 5 C.F.R. §§ 752.301-04 are applicable. A right to a personal reply is not provided in that instance. 5 C.F.R. § 752.302(b):

> An employee is entitled to a reasonable time[18] for filing a written answer to the notice of proposed suspension. If the employee answers, the agency shall consider the answer in reaching its decision.

V.

The final procedural error asserted by the appellant, and the one we find meriting the most discussion, relates to the effectiveness of his personal reply to the original removal notice. As mentioned earlier, 5 U.S.C. § 7512(b)(2) (1970) grants a preference eligible employee against whom adverse action is proposed "a reasonable time for answering the notice personally and in writing." Appellant charges that this mandate was circumvented when he was not allowed to reply personally to the District Director but was relegated to an "oral reply officer." Asserting that the right

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[18] 5 C.F.R. § 752.303 provides that when retention of the employee on an active duty status may be detrimental to the Government, etc., "the agency may require the employee to answer the charges and submit affidavits within such time as under the circumstances would be reasonable, but not less than 24 hours."

to answer personally means the right "to confer with the official who poses to suspend or remove him," and that under *Paterson* v. *United States,* 319 F.2d 882 (Ct.Cl. 1963), the placing of an intermediary between the employee and that official does not meet the requirement, appellant attempts to void the removal action.

Reference is made to 5 C.F.R. § 752.202(b) which provides in pertinent part:

> The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

The language of the regulation is clear enough, and would indicate that the oral reply officer must at a minimum have power of recommendation. Yet the unique propensity of the legal process to render murky the clearest of thoughts has run its normal course. Within certain guidelines, namely that an oral reply is assured, *see Washington* v. *United States,* 147 F.Supp. 284 (Ct.Cl. 1957), *petition for cert-dismissed per stipulation,* 355 U.S. 801 (1957), that an interview with any particular officer is not guaranteed, *see O'Brien* v. *United States,* 284 F.2d 692 (Ct.Cl. 1960), and that an "investigator intermediary" is not permissible, *see Paterson* v. *United States, supra,* the requirement has been subjected to varying interpretations. This is in part due

to a 1960 Court of Claims decision, *O'Brien* v. *United States, supra.*

In *O'Brien* a Justice Department employee received notime of proposed adverse action and was granted an oral reply to the first assistant to an Assistant Attorney General. The Assistant Attorney General possessed the power to recommend dismissal to the Dtputy Attorney General who had the power of termination. The employee-petitioner raised a familiar challenge, and the court replied, 284 F.2d at 694-95:

> Apparently, plaintiff believes that his bureaucratic superior denied him the opportunity to make a personal appeal when he delegated to a subordinate the task of hearing plaintiff's oral presentation. We cannot agree. No decision of this court has suggested what form the personal interview at the agency level onght to take, except to indicate that there is no right to an adversary type hearing at this stage. Certainly, anything that the plaintiff might have presented to the Assistant Attorney General he could have presented to his assistant who prepared an extensive memorandum following the interview. It is true that this delegate did not have the power to hire and fire the plaintiff, but neither did the Assistant Attorney General. He merely made his recommendations to the Deputy Attorney General after having considered, we must presume, any material which plaintiff had presented at the personal interview. We believe that the procedure followed with respect to the agency hearing was in full compliance with the statute. We do not think that the statute guarantees a veteran an interview with any particular official as long as he is given the opportunity to present such appeals as he may wish to make to a superior who has the authority to either recommend or take final action. (Citation omitted.)

This language could be interpreted as requiring no recommendation authority in the officer charged with actually hearing the reply. This could be consonant with actually hearing the reply. This would be consonant with a normal reading of 5 C.F.R. § 752.202(b) only if "hearing" the oral answer need not be in person, but rather could be by transcript of an oral answer made to another individual. If such were the case, in view of the power of the District Director (to whom the transcript was forwarded) to make the final removal decision, appellant's position would be completely without merit. Naturally, such is not the case. Any interpretation of that nature was rejected by the Court of Claims in *Ricucci* v. *United States*, 425 F.2d 1252 (Ct. Cl. 1970), *motion for reconsideration denied*, 432 F.2d 453 (Ct. Cl. 1970).

Ricucci involved the proposed removal of an employee of the Internal Revenue Service. The employee elected an oral reply, which he made to an IRS Special Agent appointed by the District Director. The reply proceeding was evidentally similar to that held in our case,[19] and at its conclusion the reply officer stated "Mr. Ricucci's reply and all materials submitted here today will be carefully considered and a decision will be rendered by the District Director." The court noted that there was nothing in the record to indicate that the oral reply officer ever made, or had the power to make, a recommendation.

Looking to a requirement that there be a "significant difference in use and function between an oral reply and a written reply"—else why provision for both—the *Ricucci* court, in reversing the Commission, held that the employee was "entitled to a general give and take discussion of the case, which the appointment of an investigator[20] as 'oral

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[19] *See* Footnote 13 *supra*.

[20] The oral reply officer in *Ricucci* was a member of the IRS Intelligence Division. "That Division we understand investigates

reply officer' seems as if expressly designed to negate." 425 F.2d at 1254-55. The court noted that it must be the oral reply officer himself who has the power to recommend or finally act on the proposed disposition. That officer should additionally be a member of the class of "those who would so recommend in the regular course of their duties, whether or a line or staff nature." 425 F.2d at 1255. The court concluded:

> Taking the Regulation and Manual together, in summary, we read them as written for the protection of employees, and meaning that . . . the accused employee may have an opportunity to discuss his case with an official of his agency. Not only may he state anything he pleases, from the number of mouths he has to feed to the alleged bias of his immediate supervisor, but he may expect help in presenting his case in form of such comments from the other side as would be natural from a person knowledgeable about the case and expecting largely to influence its resolution. Courts could hardly measure out the exact amount of loquacity he could demand, but at least they can discourage choice of an agency representative professionally trained to disclose nothing. Further, he has a right to expect that that "oral reply officer" will be one whose recommendation would be meaningful, not an empty formality.

425 F.2d at 1255-56.

We reserve judgment on the extensive standards established by the Court of Claims, At a minimum, however,

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taxpayer frauds and is organizationally separate both from plaintiff's part of the Agency and from the Inspection Service which investigates employee misconduct." 425 F.2d at 1253.

The *Ricucci* court limited *Paterson* v. *United States*, 319 F.2d 882 (Ct. Cl. 1963), to a situation where the "investigator" had developed facts to substantiate the charges involved in the same adverse action in which he was called to hear the oral reply. We agree.

we agree that the purpose of an oral reply as expostulated by the *Ricucci* court would be thwarted absent a power of meaningful recommendation of disposition vested in the individual who personally meets with the employee.[21] Unfortunately, the record before us is barren concerning the powers of the oral reply officer.[22] We would be dealing in conjecture and perhaps self-deception were we to attempt to glean from the record the compliance, or noncompliance, with the statutory procedural requirements of a meaningful oral reply. The ultimate question governing disposition of the entire matter thus becomes "On whose shoulders must rest the burden of our lack of information?" If the appellees', then at a minimum remand to ths district court

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[21] The purpose of the oral reply, which *Ricucci* so correctly discussed, has long been misunderstood. An example of the misunderstanding can be seen in the Government's oral argument in this case, a portion of which follows:

> Mr. FRIEDMAN (Assistant United States Attorney):
>
> Perhaps this oral reply officer is not even the person to recommend whether there should be a suspension or removal, that doesn't appear in the record, but he does submit to his superior a report that of oral reply hearing and in this case on the basis of that report the District Director made a recommendation, and the Regional Commissioner, as I understand it, made a determination. So it, perhaps, and I'm not sure the record is clear on this, the oral reply officer merely transmits anything that is submitted to him, because that's the purpose of the oral reply hearing—for the man who they are considering taking adverse action against to come in and say "Well I deny it" or "Here's some material for you to consider" or "Here's a statement I want to make." So that that can be considered before the adverse action is taken, and the wheels are begun to move from which there then is given the right of a hearing, appeals, and so on."

[22] We reject appellant's contention in his Reply Brief that the transcript of the oral reply hearing shows that the hearing officer had neither the authority to make nor recommend a final decision. *See* footnote 13 *supra*.

with instructions to remand to the Commission for further hearings is required; if the appellant's, affirmance of the district court is required.

Throughout the proceedings, from his first letter to the Regional Commissioner to his final appeal to the Commission, appellant has complained of various procedural deficiencies in his removal. Nowhere, however, not even in the district court below, did he raise a specific challenge regarding the qualifications of the oral reply officer. It is thus for the *first time* on *this* appeal that appellant circuitously draws attention to this possible procedural defect.

We could merely repeat again the oft repeated hornbook phrase that appellate courts will not sit in review to correct errors never claimed at the agency level, except where necessary to avoid unfairness or injustice, and thus mercifully bring to an end this somewhat lengthy discourse. Our perturbation and frustration at the failure to raise the issue below, which failure results in the absence of a meaningful record on which to judge the merits of an important question, forces us to indulge on the reader's patience for a moment longer.

In *Connell* v. *Nitze*, 401 F.2d 416 (D.C. Cir. 1968), the appellant for the first time in the district court alleged a procedural error which we found to be of convincing merit. Noting the inadequacy of the "legal advice" that the appellant had received regarding his procedural rights, the "less than searching presentation on his behalf made by the union to the Commission," and the irresponsible action on the part of the agency, we overlooked the untimeliness of the challenge and reversed the district court. Similar action is not the rule but the exception. Finding here none of the factors considered persuasive in *Connelly*, we decline to remand for further hearings.

In *Goldwasser* v. *Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), we were faced with a similar untimely claim going to the standard utilized by the

"Appeals" Examiner" in reaching his decision regarding the appellant's adverse action appeal. We declined to consider the issue, stating in language appropriate to this case:

> We think that this contention comes far too late to warrant its being made the occasion for *judicial* invalidation of *administrative* proceedings. The issue is one peculiarly appropriate for bringing to the attention of the administrative tribunal in the first instance in order that it may have the opportunity to consider, and to dispel if necessary, any infirmities which cause litigants before it to doubt the essential fairness of the hearing.

417 F.2d at 1174-75.

Ample opportunity was given to the appellant to raise the existence of procedural defects in the proper forum, at the agency and Commission levels, so that evidentiary hearings and a thorough sounding of the matter could be initiated. Appellant did raise several specific challenges, notably those relating to delay, cross-examinations, and substantiality, but until now any infirmities in the powers of the oral reply hearing officer have not even been hinted. The boilerplate language of challenge to all procedures is not the minimum specification of issues we deem necessary.

The fluctuating state of the law could excuse a misdirected challenge to the authority of the oral reply officer, but not the absence of a challenge altogether. Litigation must end somewhere. In this scheme of judicial review that somewhere (as to the issues to be considered on appeal) is the Commission. "Great is the art of beginning, but greater the art is of ending." [23] Finding no good reason to divert

Affirmed.

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[23] H. LONGFELLOW, *Elegiac Verse*, stanza 14 (1881).

from the general rule the opinion of the district court is

APPENDIX C

Orders Issued By The United States Court Of Appeals For The District Of Columbia Circuit Denying Petitioner's Motions For Rehearing And Reconsideration

[Filed May 11, 1973]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 71-1920

Civil Action 2019-69

IRVING POLCOVER, Appellant

v.

SECRETARY OF THE TREASURY, ET AL

Before: Bazelon, Chief Judge; Tamm, Circuit Judge and Winter*, United States Circuit Judge for the Fourth Circuit.

Order

On consideration of appellant's petition for reconsideration, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

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* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D. C. 20001

May 11, 1973

No. 71-1920—Irving Polcover v. Secretary of the Treasury, et al

Edward L. Merrigan, Esq.
888 - 17th Street, N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

Enclosed is a copy of the Court's order denying your petition for reconsideration.

You are further informed that your suggestion for rehearing *en banc* was transmitted to the full court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for rehearing *en banc*.

Yours very truly,

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

HEK/bjg

cc: John A. Terry, Asst. U.S. Attorney
Enc.

SUPREME COURT, U. S.
FILED
OCT 2 1973
MICHAEL RODAK, JR., CL

No. 73-268

In the Supreme Court of the United States

OCTOBER TERM, 1973

IRVING POLCOVER, PETITIONER

v.

SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-268

IRVING POLCOVER, PETITIONER

v.

SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks reinstatement in his federal job, alleging that his discharge for bribery was illegal since the government relied on testimony adduced at his criminal trial on the same charges (of which he was acquitted), the witness against him was not produced, and the hearings provided were inadequate.

In 1964 petitioner, an Internal Revenue Agent with eighteen years of federal service and a Veterans Preference Act beneficiary, was suspended and subsequently removed from his job for accepting a bribe in connection with the audit of a tax return and failing to report it. Petitioner pursued his administrative appeal rights, and a hearing was scheduled. Before it could be held, the United States Attorney for the Southern District of New York requested that administrative action on the appeal be held in abeyance pending completion of

criminal proceedings against petitioner. Petitioner subsequently was indicted, tried, and acquitted on a two-count bribery charge. The administrative hearing on his appeal of the dismissal action was then held. The primary evidence against appellant at the hearing was the transcript of testimony given at the trial by Mr. Goldstein, the alleged briber. The Hearing Examiner found that a preponderance of the evidence sustained the charges, and his decision was affirmed throughout the remainder of the administrative appeal process.

Thereafter, on July 18, 1969, petitioner filed suit for reinstatement and back pay. The district court, on consideration of cross motions for summary judgment, granted the government's motion and dismissed the action. The Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. B).

Contrary to petitioner's contentions (Pet. 25-27) the court of appeals applied the proper standard of review, fully considered petitioner's arguments, and found them to be without merit. No further review is warranted.

1. There was ample evidence before the Hearing Examiner to support the charges made against petitioner, including a sworn affidavit by Mr. Goldstein, the alleged briber, the transcript of the criminal trial, and work papers of Mr. Goldstein and his client which tended to support the allegation of bribery (Pet. App. B, p. 14). Petitioner's contention that the agency failed to meet its burden of proof is without merit.

2. Even though petitioner was acquitted in the criminal proceedings, this did not bar his dismissal from federal service on the same evidence. Proof by a preponderance of the evidence justifies the discharge of a federal employee; he cannot be convicted in criminal

proceedings unless the charge is proved beyond a reasonable doubt. See *Finfer* v. *Caplin*, 344 F. 2d 38 (C.A. 2), certiorari denied, 382 U.S. 883; *Silver* v. *McCamey*, 221 F. 2d 873 (C.A.D.C.)

3. Petitioner did not request the production of the witness against him until the end of the hearing. The request was thus not timely, and was properly denied. *Williams* v. *Zuckert*, 371 U.S. 531. Moreover, the witness had been subjected to extensive cross-examination by petitioner at the criminal trial, and his testimony on cross-examination was part of the record before the Internal Revenue Service and the Civil Service Commission. Consequently petitioner's lack of opportunity to reconfront the witness was not a denial of due process.

4. The court of appeals did not, as petitioner alleges, find that his removal was in violation of the Veterans Preference Act. Instead it refused to consider the contention, first raised on appeal, that an "oral reply officer" was not a proper official to hear petitioner's reply to the notice of proposed adverse action. It noted that the record was devoid of any reference to the powers of the "oral reply officer", and that despite ample opportunity, this defect had not been raised below, where the record could have been supplemented (Pet. App. B, pp. 19-26).

5. Finally, petitioner alleges that he has a Fifth Amendment right to a full trial-type hearing before his discharge. This issue is now pending before this Court in *Arnett* v. *Kennedy*, No. 72-1118, probable jurisdiction noted April 2, 1973.[1]

[1]Although action was apparently taken against petitioner under 5 U.S.C. 7512, governing Veternas Preference Act beneficiaries, while Kennedy was discharged under 5 U.S.C. 7501, the Lloyd-Lafollette Act covering other non-probationary federal employees, neither statute provides for a full trial-type hearing before discharge, and neither employee received one.

The Court may accordingly wish to defer action on this petition until after its decision in *Kennedy*. We note only that petitioner has been accorded a full hearing subsequent to his discharge and the agency has considered and rejected his contentions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

DOJ-1973-10

TABLE OF CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-268

IRVING POLCOVER, *Petitioner*

v.

SECRETARY OF THE TREASURY, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

I.

In Point IV of the petition for writ of certiorari in this case petitioner contended that his rights under the Fifth and Sixth Amendments were violated from the very outset when he was *summarily* suspended and removed from his position with the Internal Revenue Service without a prior hearing (*Arnett* v. *Ken-*

nedy, No. 72-1118, prob. jurisdiction noted by this Court 4/2/73; *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972).

At page 3 of his Memorandum of Opposition, the Solicitor General now states:

> ". . . petitioner alleges that he has a Fifth Amendment right to a . . . hearing *before* his discharge. This issue is now pending before this Court in *Arnett* v. *Kennedy,* No. 72-1118, probable jurisdiction noted on April 2, 1973.
>
> *"The Court may accordingly wish to defer action on this petition until after its decision in Kennedy."* (Italics supplied.)

Certainly petitioner is genuinely grateful for the Solicitor General's suggestion. However, in fairness, this case patently presents far more compelling reasons than even *Kennedy* as to why federal employees must be accorded a just, decent, constitutional hearing *before* they are arbitrarily discharged, separated from their federal positions and bluntly deprived of their sole means of livelihood after devoting 18 years or more outstanding service to the United States.

Moreover, this case raises other equally important constitutional questions regarding the nature or type of hearing which must be afforded in cases where federal employees are suddenly vaguely charged with a *job-connected crime.* Should the Government, at such a hearing, be required to carry the burden of proof, or should the employee be compelled to prove his own innocence? Should *criminal* charges against a federal employee have to be proved beyond a reasonable doubt in a federal job removal proceeding, especially where

the employee has already been unanimously acquitted of those same charges by a United States District Court and jury? Should the Government be compelled to confront the accused employee with his accuser and allow cross-examination when the employee demands that right, or should the Government be permitted to refuse and thereafter remove the employee from his federal position at the conclusion of such a Star Chamber proceeding?[1]

All of these vitally important constitutional issues are present in the instant case. Therefore, petitioner earnestly prays that instead of simply adopting the Solicitor General's aforementioned suggestion, this Court will grant certiorari in this case, schedule it for briefing and argument with or subsequent to *Kennedy,* and thereafter finally decide same on its own merits irrespective of the outcome in *Kennedy.*

II.

Since the petition for certiorari was filed in this case, a very significant decision has been rendered by the United States District Court for the District of Columbia in the closely-related case of *Schwartz* v. *Secretary of the Treasury et al.,* C/A 699-72, U.S.D.C., D.C., 10/5/73, copy of which is printed in *Appendix I* to this brief.

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[1] At page 4 of his Memorandum, the Solicitor General erroneously states that Mr. Polcover was "accorded a full hearing subsequent to his discharge." Nothing could be less correct. As indicated, at the administrative hearings, held approximately *4 years after* his discharge, he was required to carry the burden of proof, he was denied the right to confront and cross-examine his accuser, and the Government failed to produce a single witness against him.

In that case, Mr. Schwartz, like petitioner Polcover, was employed as a fellow Internal Revenue Agent in New York. The same Mr. Goldstein charged both Mr. Schwartz and Mr. Polcover with bribery allegedly to obtain favorable tax audits for Goldstein's clients. Schwartz, like Polcover, was summarily discharged and later indicted. After many years of Government procrastination, the indictment against Schwartz was dropped for insufficient evidence and the Government filed a *nolle prosequi*. The Internal Revenue Service nevertheless continued to press the removal action against Mr. Schwartz, and through hearing *monstrosities* similar to those involved in this case, his discharge was perpetuated. The District Court, however, directed his reinstatement, holding:

> "Since plaintiff's removal was achieved in violation of his constitutional rights, plaintiff is entitled to a declaratory judgment that his removal was invalid and he is entitled to an order directing that he be reinstated to his position of Internal Revenue Agent, GS-11, Internal Revenue Service, Brooklyn, New York as of January 8, 1965, the date of his unlawful removal . . ."

Ergo, the travesty of justice inflicted on Agent Schwartz has now finally been rectified by the law. For Mr. Polcover, however, the Internal Revenue Agent who actually stood trial in federal court and was unanimously acquitted of the identical charge, the misery and poverty he has suffered for years still remain, subject to this Court's action.

III.

In fact, even before the last mentioned decision in *Schwartz,* a third New York IRS Agent named Marsan, charged with Messrs. Polcover and Schwartz by the

same Mr. Goldstein, was directed to be reinstated to his position by the Regional Commissioner of Internal Revenue for the North-Atlantic Region on the ground that clearly there was totally insufficient evidence to sustain the spurious, repetitious charge of bribery simultaneously made against so many Internal Revenue Agents by the same Mr. Goldstein who was obviously seeking immunity from federal prosecution on charges completely unrelated to any of those involved in this case, *Schwartz* or *Marsan* (See *Matter of Justen Marsan,* Letter of Reinstatement dated 2/9/69, *Appendix II* hereto).

Finally, as the record in this case shows, *during Mr. Polcover's criminal trial in the United States District Court in New York, the accuser Mr. Goldstein openly admitted before the District Court that, on at least one other occasion, he had falsely accused a fourth Internal Revenue Agent of bribery, and there and then withdrew the charge against that agent.*

How, therefore, can this Court possibly deny certiorari in this case if this outrageous injustice against petitioner Polcover is to be rectified?

IV.

In his memorandum in this case, the Solicitor General constantly leaves the inaccurate impression that hearing procedures conducted by the Internal Revenue Service and the Civil Service Commission in cases of this kind are fair and just and that same in no respect deprived Mr. Polcover of his basic constitutional rights. In *Ricucci* v. *United States,* 425 F.2d 1252 (Ct.Cl. 1970) those same hearing procedures were carefully scrutinized by the Court of Claims in a case wherein another

Internal Revenue Agent was charged with "improper business relations with a taxpayer whose returns the Agent had audited." After reviewing those procedures, the Court of Claims ruled in favor of the discharged Agent stating that the hearing procedures were conducted in violation of applicable regulations; that same were replete with abuses of discretion and that they were absolutely arbitrary and capricious (See 425 F.2d 1256). More specifically, however, Judge Skelton and Judge Collins in their concurring opinion described those same agency procedures petitioner Polcover was forced to endure in this case as follows, at 425 F.2d 1256-1260:

> "I *The Discharge of the Plaintiff Without A Hearing Denied Him Due Process*
>
> "The agency followed the usual practice of government departments by serving notice of charges on the plaintiff, allowing him to make an oral reply, and then summarily discharging him from his job without a hearing (notwithstanding his 24 years of government service). The government says this procedure was authorized by the regulations. This may be true, but in my opinion to deny an employee of the government who has civil service rights his job without a hearing, in the absence of a national emergency or government security problem, is to deny him his constitutional rights of due process. I can see no meaningful difference between this situation and that which existed in Goldberg v. Kelly, 397 U.S. 254. . . .
>
> "Consequently, I think that when the plaintiff was discharged without a hearing in our case, his property (his job) was taken from him without due process of law, notwithstanding any regulation or lack of one to the contrary. *A hearing for an*

employee who has already been discharged could hardly be a meaningful one because it is a proceeding after the fact.

"II *The Burden of Proof Was Erroneously Placed On The Plaintiff*

"At the hearing in this case (if we can dignify it by calling it a hearing), the examiner required the plaintiff to put on his evidence first. . . . In any event, at the time plaintiff was required to put on his evidence, no evidence had been offered against him. There was nothing at the hearing for him to rebut or overcome. *The defendant has the burden of proof on the whole case to show that plaintiff should be discharged for the good of the service. . . . To require the plaintiff to introduce his evidence first is like requiring an accused in a criminal trial to prove his innocence. In my opinion, this was an unauthorized shifting of the burden of proof and amounted to a denial of due process. . . .*

"IV *The Decision Was Not Supported By Substantial Evidence*

"In my opinion, the decision of the examiner against the plaintiff, which became the decision of the Commission, was not supported by substantial evidence. . . .

"V *The Plaintiff Was Not Given A Fair And Meaningful Hearing*

"The Supreme Court ruled in *Goldberg* v. *Kelly, supra:*

> '. . . The hearing must be at a meaningful time and in a meaningful manner . . .'

"In my opinion, there was no such hearing in this case. Actually, there was no hearing at all. The examiner went through a formality which was

called a hearing, but it was not held in a 'meaningful manner,' nor was it fair. As far as plaintiff was concerned, it was an exercise in futility. The case was 'cut and dried' against him in advance. The rules and regulations were not complied with except when their observance worked against him. The rights and privileges to which he was entitled under the law were denied him."

CONCLUSION

Patently, the hearing procedures conducted against petitioner Polcover in the case at bar were, in the words of Judges Skelton and Collins, *supra,* nothing more than "an exercise in futility. The case was 'cut and dried' against him in advance." The constitutional "rights and privileges to which he was entitled under the law were denied him." Plainly, therefore, the petition for writ of certiorari in this case must be granted.

Respectfully submitted,

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Attorneys for Petitioner

October 12, 1973

called a hearing, but it was not held in a 'meaningful manner,' nor was it fair. As far as plaintiff was concerned, it was an exercise in futility. The case was 'cut and dried' against him in advance. The rules and regulations were not complied with except when their observance worked against him. The rights and privileges to which he was entitled under the law were denied him."

CONCLUSION

Patently, the hearing procedures conducted against petitioner Polsover in the case at bar were, in the words of Judges Skelton and Collins, supra, nothing more than "an exercise in futility. The case was 'cut and dried' against him in advance." The constitutional "rights and privileges to which he was entitled under the law were [illegible] only, therefore, the petition for writ of certiorari in this case must be granted.

Respectfully submitted,

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Attorneys for Petitioner

October 12, 1973

APPENDIX

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 699-72

CHARLES J. SCHWARTZ, *Plaintiff*,

v.

SECRETARY OF THE TREASURY, COMMISSIONER OF INTERNAL REVENUE, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION

and

COMMISSIONERS, U. S. CIVIL SERVICE, *Defendants*.

Memorandum Opinion and Order

(Filed 10/5/73)

APPEARANCES:

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888 17th Street, N. W.
Washington, D. C. 20006
Counsel for the Plaintiff

Honorable Harold H. Titus, Jr.
United States Attorney for the
District of Columbia
and
Arnold T. Aiken, Esquire
Assistant United States Attorney
Civil Division
and
J. Michael McGarry, Esquire
Assistant United States Attorney
Civil Division
United States Courthouse
Washington, D. C. 20001

Plaintiff, Charles J. Schwartz, seeks a declaratory judgment and mandatory injunction against defendants, the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Chairman and Commissioners of the United States Civil Service Commission, fixing, declaring and determining his right as a Veterans' Preference civil service employee of the United States to be restored to the position in the Brooklyn, New York office of the Internal Revenue Service from which he was suspended on December 9, 1964, and removed on January 8, 1965.

Plaintiff and defendants each filed Motions for Summary Judgment, and defendants filed a Motion to Dismiss in the alternative. Both parties advised the Court that there is no genuine issue as to any material fact and submitted statements pursuant to Local Rule 9(h). The Court has considered the transcript of the administrative proceedings and the memoranda submitted in support of these motions and in opposition thereto and has concluded that there are no genuine issues of fact that require a trial on the merits, that plaintiff's Motion for Summary Judgment should be granted, and that defendants' Motion for Summary Judgment and Motion to Dismiss should be denied for the reasons set forth below.

Charles J. Schwartz, the plaintiff in this action, entered the service of his country during the Second World War as a combat infantryman. Although seriously wounded in Normandy, he was returned to combat duty until he was honorably discharged in 1945. For a period of 15 years prior to December, 1964, plaintiff was a Veterans' Preference civil service employee of the United States employed by the Internal Revenue Service as an Internal Revenue Agent. In 1964, Albert Goldstein, an accountant-lawyer in New York City, informed the United States Attorney for the Southern District of New York that he personally had paid cash bribes to a number of Internal Revenue Agents, including plaintiff, in return for favorable audits of his clients' tax returns. On or about November 22, 1964, plain-

tiff was escorted from his office by two Internal Revenue Inspectors to the United States Attorney's Office in New York. An Assistant United States Attorney informed plaintiff that he was charged with a serious crime and he was then confronted by Goldstein, his accuser. That same day plaintiff consulted with his attorney, who was at the time involved in other litigation. Plaintiff was advised not to answer any questions until his attorney was free to accompany him. On the following day, November 23, 1964, a criminal complaint was filed against plaintiff in the Southern District of New York. Also on November 23, 1964, plaintiff was questioned by two Internal Revenue Service Inspectors in the absence of his attorney concerning his connections with Goldstein. At this interview plaintiff was advised of his Fifth Amendment right to remain silent and when asked whether he had received any money from Goldstein, plaintiff refused to answer because "[t]his goes to the crux of the whole matter, the original accusation . . . and I feel . . . consultation for legal advice is necessary." Transcript of Administrative Proceedings, at 307. At all subsequent stages of the administrative proceedings plaintiff had the benefit of counsel and unequivocally affirmed his innocence.

On December 1, 1964, plaintiff received a written Notice of Proposed Adverse Action—a notice of both suspension and removal—based on two charges, one involving the acceptance of a bribe, the second concerning the failure to report the offer of a bribe.[1] Plaintiff was suspended for a

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[1] "*Charge I: Acceptance of a Bribe*

Specification: On or about January 12, 1962, you accepted the sum of $250.00 from Mr. Albert M. Goldstein, an accountant of 4 E. 43rd Street, New York, New York, to influence your decision and action in your audit of the 1960 income tax return of his client . . . .

Charge II: Failure to Report the Offer of a Bribe

Specification: You failed to report the offer of the bribe set forth in the specification to Charge I above."

period of 30 days beginning on December 9, 1964, and removed on January 8, 1965. Plaintiff appealed his removal to the Civil Service Commission Regional Office in New York, but all action on that appeal was suspended pending disposal of the criminal charges against him. An indictment was returned against plaintiff in October, 1965, which remained pending until the government filed a *nolle prosequi* on June 14, 1968. In the last two months of 1968, a hearing was held on plaintiff's administrative appeal. His suspension and removal were affirmed and plaintiff again appealed, this time to the Civil Service Commission Board of Appeals and Review. On August 25, 1969, almost five years after plaintiff had received a Notice of Proposed Adverse Action, the Board sustained his removal. Being without the necessary financial means to bring an action in this Court, plaintiff appealed to his union to prosecute this action on his behalf, which it finally agreed to do two and a half years later.

This Court has jurisdiction of this action under 28 U.S.C. § 1331 and is empowered to render a declaratory judgment herein under the provisions of 28 U.S.C. § 2201. See, *e.g.*, *Meehan* v. *Macy*, 392 F.2d 822 (D.C. Cir. 1968); *Weinberg* v. *Macy*, 360 F.2d 816 (D.C. Cir. 1965); *Massman* v. *Secretary of Housing & Urban Development*, 332 F. Supp. 894 (D.D.C. 1971). The Court is not impressed by the contentions of the defendants that jurisdiction is exclusively in the United States Court of Claims or that plaintiff has failed to join the proper parties, nor is the Court persuaded that plaintiff's suit is barred by laches. See *Powell* v. *Zuckert*, 366 F.2d 634 (D.C. Cir. 1966).

The Court recognizes that in employee adverse action litigation such as this, it is engaged in limited review and that its determination is based upon the agency record submitted to it. The function of the Court is to review the record and determine whether there has been procedural

error, whether there is substantial evidence to support the agency action, or whether the action is in some manner otherwise arbitrary or capricious. *Palcover* v. *Secretary of the Treasury,* 477 F.2d 1223, 1226, 1227 (D.C. Cir. 1973); see *e.g., Moore* v. *Administrator,* 475 F.2d 1283 (D.C. Cir. 1973); *Adams* v. *Laird,* 420 F.2d 230 (D.C. Cir. 1969); *Mendelson* v. *Macy,* 356 F.2d 796 (D.C. Cir. 1966).

Plaintiff raises numerous grounds in support of his motion for summary judgment. Since plaintiff's removal is found to have been achieved in violation of his Fifth Amendment rights, the Court need not raise or pass on plaintiff's other arguments. The record indicates that on or about November 22, 1964, plaintiff was personally informed by an Assistant United States Attorney of the criminal charge against him. On the following day, plaintiff was interrogated by two Internal Revenue Service Inspectors concerning his connections with Albert Goldstein. On advice of counsel, plaintiff declined to answer any questions in the absence of his attorney. This refusal to answer became a significant factor in the administrative appeal of his removal. When plaintiff's case was before the New York Regional Office of the Civil Service Commission, the Regional Director concluded:

> "Finally, we consider significant the appellant's refusal to respond to the questions asked of him by the IRS Inspectors at the interview with him held on November 23, 1964. His refraining from answering questions concerning matters of official interest to competent Treasury authority and directly related to his responsiblitiy as a Revenue Agent does not comport with the actions of a person who considers himself innocent."

Transcript of Administrative Proceedings, at 53.

When plaintiff appealed to the Civil Service Commission Board of Appeals and Review, the Board concluded:

> "With regard to the merits of the case, basically, the question is one of credibility . . . .
>
> . . . The Regional Office's reference to the appellant's refusal to respond to IRS official questions was not improper since it was made in connection with the issue of appellant's credibility. It was right and reasonable for the IRS Inspectors to ask the appellant if he ever received any monies in connection with any audit made by him. Appellant's refusal to answer such questions without the presence of and consultation with counsel does raise a doubt as to the appellant's veracity with regard to any subsequent statement made by him concerning the same matter.

Transcript of Administrative Proceedings, at 10-11.

At the outset, it must be noted that plaintiff was not charged with insubordination or failure to answer questions in the Notice of Proposed Adverse Action issued by the Internal Revenue Service. Had this been the case a different result might follow here.[2] The Civil Service Commission, however, despite the fact that plaintiff was then the subject of a criminal investigation, considered plaintiff's refusal to answer as evidence of his credibility, as conduct that did not "comport with the actions of a person who considers himself innocent." Transcript of Administrative Proceedings, at 53.

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[2] Chapter C-2, Section 2, Rule 23 of the Treasury Department's Personnel Manual provides:

> "Giving Testimony: When directed to do so by competent Treasury authority, employees must testify or respond to questions (under oath when required) concerning matters of official interest."

The Court makes no judgment whether removal on this basis would have been proper.

The Regional Director was of the opinion and the defendants argue that plaintiff had no right to counsel at this stage of the proceedings and therefore that his refusal to answer was not justified. The defendants also make much of the fact that plaintiff at no time specifically asserted his Fifth Amendment right to remain silent. Assuming, although not deciding, that plaintiff had no right to counsel at the time of his interview, the Court believes that the use of plaintiff's silence was substantive evidence by the Civil Service Commission constituted an impermissible infringement of his constitutional privilege against self-incrimination. It is well settled that a claim of the privilege does not require any special combination of words. *Quinn* v. *United States,* 349 U.S. 155 (1955). In the absence of counsel, the decision of an accused to say nothing and terminate an interview has been held sufficient to indicate an implied reliance on the constitutional privilege. *United States* v. *Allsenberrie,* 424 F.2d 1209, 1215 (7th Cir. 1970). That plaintiff was acting on the advice of counsel reinforces the conclusion that plaintiff, albeit imperfectly, was exercising his Fifth Amendment right, since the reason for this advice could only have been that counsel was aware of the fact that anything plaintiff said might be used against him.

The use of plaintiff's refusal to answer questions as substantive evidence was a "penalty imposed . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin* v. *California,* 380 U.S. 609, 614 (1965). In *Slochower* v. *Board of Higher Education,* 350 U.S. 551 (1956), the Supreme Court held that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege when questioned by a congressional committee:

> "In *Ullman* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privi-

> lege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

350 U.S. at 557-58. While the courts are not and should not be in tthe business of removing and reinstating civil servants, the procedures undertaken by a government agency to remove employees must conform to the requirements of the law and respect an employee's constitutional rights. Since the effect of the use of plaintiff's refusal to answer by the Civil Service Commission was to discharge plaintiff for invoking his constitutional privilege, an act condemned by the Supreme Court in *Slochower,* plaintiff's removal cannot stand.

> "[Plaintiff's] assertion of one constitutional right, his right of counsel, and his reliance upon another constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance."

Fagundes v. *United States,* 340 F.2d 673, 677 (1st Cir. 1965).

Since plaintiff's removal was achieved in violation of his constitutional rights, plaintiff is entitled to a declaratory judgment that his removal was invalid and he is entitled to an order directing that he be reinstated to his position of Internal Revenue Agent, GS-11, Internal Revenue Service, Brooklyn, New York as of January 8, 1965, the date of his unlawful removal, together with restoration of all rights, benefits and privileges that would have accrued from a continuity of service from the date of such unlawful removal

to the present. *Massman* v. *Secretary of Housing & Urban Development,* 332 F.Supp. 894, 900 (D.D.C. 1971). *Paroczay* v. *Hodges,* 219 F.Supp. 89, 94, 96 (D.D.C. 1963). Upon correction of the unlawful personal action, plaintiff is entitled to an administrative settlement of his back pay claim for the period the unlawful removal action was in effect, such settlement to be in accordance with the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1970). This order shall not be construed to constitute an award of a money judgment in favor of plaintiff.

By virtue of the foregoing, it is this 5th day of October, 1973,

ORDERED, that plaintiff's Motion for Summary Judgment be, and the same hereby is, granted; and it is further

ORDERED, that defendants' Motion for Summary Judgment and Motion to Dismiss be, and the same hereby are, denied.

/s/ THOMAS A. FLANNERY
United States District Judge

Judgment

This action came before the Court on plaintiff's Motion for Summary Judgment and on defendants' Motion to Dismiss and Motion for Summary Judgment. The Court having considered the memoranda submitted in support thereof and in opposition thereto, it is this 5th day of October, 1973,

ORDERED, ADJUDGED, and DECREED that the actions taken by the Internal Revenue Service of the Department of the Treasury and the Civil Service Commission to remove plaintiff, Charles J. Schwartz, from his position as Internal Revenue Agent at the Brooklyn, New York office of the Internal Revenue Service on January 8, 1965, were invalid

and plaintiff is, therefore, entitled to be reinstated to said position as of January 8, 1965, the date of his unlawful removal, and to restoration of all rights, benefits and privileges that would have accrued from a continuity of service from that date to the present time; and upon correction of the unlawful personnel action, plaintiff is further entitled to an administrative settlement of his back pay claim for the period the unlawful removal action was in effect, such settlement to be in accordance with the provisions of the Back Pay Act, 28 U.S.C. § 5596 (1970); however, nothing herein shall be construed to constitute an award of a money judgment in favor of plaintiff; and it is further

ORDERED, ADJUDGED and DECREED that defendants, the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Chairman and Commissioners of the Civil Service Commission, their agents, servant and employees be and the same hereby are directed to take any and all actions necessary forthwith to reinstate plaintiff, Charles J. Schwartz, to his position of Internal Revenue Agent at the Brooklyn, New York office of the Internal Revenue Service as of January 8, 1965, the date of his unlawful removal, and to restore to plaintiff all rights, benefits and privileges that would have been accrued to him from a continuity of federal service from January 8, 1965 to the present time; and upon correction of the unlawful personnel action, to make every reasonable effort administratively to settle plaintiff's back pay claim for the period the unlawful removal action was in effect, such settlement to be in accordance with the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1970).

/s/ THOMAS A. FLANNERY
United States District Judge

APPENDIX II

US TREASURY DEPARTMENT
REGIONAL COMMISSIONER
INTERNAL REVENUE SERVICE
NORTH-ATLANTIC REGION
90 CHURCH ST., NEW YORK, N.Y. 10007

February 19, 1969

Mr. Juston Marsan
2255 Fifth Avenue
New York, New York 10035

Dear Mr. Marsan:

I have carefully and impartially reviewed the entire appellate record concerning your removal from the Service. Included in my review were the transcript of the appeal hearing held on November 19, 1968 and the Hearing Officer's Report of Findings dated February 17, 1969, a copy of which is attached.

After a thorough review and evaluation of the record, I find that the conclusions of the Hearing Officer are consistent with the facts of the record. Therefore, I have decided to cancel your removal and suspension and to restore you to duty retroactively to December 9, 1964.

You will be advised by the Director, Brooklyn District of the time and date that you are to report for duty and of your entitlement to back pay.

Very truly yours,

/s/ HAROLD R. ALL
Harold R. All
Regional Commissioner